

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
KENT M. SWIG,

Plaintiff,

Case No.:
07-CV-06672-VM

- against -

ARCH INSURANCE COMPANY, JAMES STUMPF
and TREVOR PRINCE

NOTICE OF MOTION
PURSUANT TO RULE
12(b)(1)

Defendants.
-----X

SIRS:

PLEASE TAKE NOTICE, that upon the affidavit of John J. Richardson, sworn to October 9, 2007, and the exhibit attached thereto and the accompanying memorandum of law, and upon all of the papers filed and proceedings had herein, the undersigned will move this Court, before United States District Judge Victor Marrero at the United States Courthouse, 500 Pearl Street, New York, NY, on a date and at a time to be determined by the Court, for an order pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the complaint on the ground that this Court does not have jurisdiction of the subject matter of this action under 28 U.S.C. § 1332.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, are to be served and filed in accordance with Local Civil Rule 6.1 and the Individual Practices of Judge Marrero.

Dated: Jericho, New York
October 11, 2007

TORRE, LENTZ, GAMELL, GARY
& RITTMASER, LLP
Attorneys for Defendant
Arch Insurance Company

By: 

Steven H. Rittmaster (SR 3510)

100 Jericho Quadrangle, Suite 309
Jericho NY 11753-2702
(516) 240-8900

To: Penn Proefriedt Schwarzfeld & Schwartz
Attorneys for Plaintiff
114 West 47th Street
New York, NY 10036

Marc S. Brown, Esq.
Hiscock & Barclay, LLP
Attorneys for Defendants
James Stumpf and Trevor Prince
2000 HSBC Plaza
100 Chestnut Street
Rochester, New York 14604-2404

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KENT M. SWIG,

Plaintiff,

Case No.:
07-CV-06672-VM

- against -

ARCH INSURANCE COMPANY, JAMES STUMPF
and TREVOR PRINCE

AFFIDAVIT IN SUPPORT
OF MOTION TO DISMISS
COMPLAINT

Defendants.

-----X
STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

John J. Richardson, being duly sworn, says:

1. I am Vice President and Deputy General Counsel of defendant Arch Insurance Company ("Arch") and I have personal knowledge of facts set forth herein.
2. I make this affidavit in support of Arch's motion (prior to answering the complaint), pursuant to Fed. R. Civ. P. 12(b)(1), for an order dismissing the complaint against Arch on the ground that plaintiff and defendant Arch are both citizens of the State of New York and, accordingly, there is no diversity jurisdiction under 28 U.S.C. §1332.
3. As more fully set forth below and in the accompanying memorandum of law, for the purposes of diversity jurisdiction under §1332, Arch is a citizen of the State of Missouri where it is incorporated and the State of New York where it has its principal place of business. Accordingly, since plaintiff admits that he is a citizen of the State of

New York (¶1 of the complaint), diversity of jurisdiction under 28 U.S.C. §1332 does not exist and the complaint must be dismissed as against Arch.

The Action

4. In the instant action, plaintiff Swig seeks a judgment declaring that Arch's demand for payment under a written agreement of indemnity executed by Swig, and others, in favor of Arch, is unfounded and that Swig should not be required to make any payment on account of such demand or under said agreement of indemnity.¹

Arch's Principal Place of Business

5. Arch is licensed in all 50 states, the District of Columbia and Puerto Rico and transacts business in all of those jurisdictions.

6. The instant complaint (¶2) mistakenly alleges, upon information and belief, that Arch has its principal place of business in Philadelphia, PA. In fact, Arch's principal place of business is at One Liberty Plaza, New York, NY 10006. Attached hereto as Exhibit A is the first page of the Annual Statement for the year ended December 31, 2006 that Arch filed in Missouri, the state of its incorporation. As evidenced thereon (and highlighted for convenience of reference), One Liberty Plaza, New York, NY is set forth as the location of Arch's "Main Administrative Office" and the "Primary Location of Books and Records."

7. Based upon the following indisputable facts, it is clear that Arch's principal place of business is in New York:

¹ There is presently pending in the Supreme Court of the State of New York, County of New York an action by Arch against Swig, commenced subsequent to the commencement of the instant action, seeking to enforce the provisions of that very same agreement of indemnity and recover a sum in excess of \$200,000 thereunder from Swig.

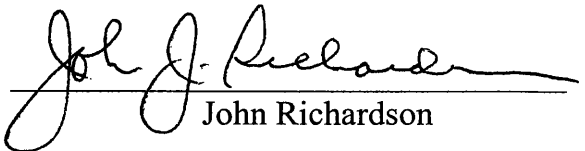
- a. Arch's Chairman and Chief Executive Officer, its President and Chief Operating Officer, its Chief Financial Officer, its General Counsel, its Chief Claims Officer and its Senior Vice President for Marketing, along with other senior executives, all have their offices in the New York City office;
- b. Arch's board of directors meets in New York City;
- c. all corporate policy, business and management decisions originate and are formulated in the New York City office;
- d. all accounting and financial functions and matters are managed from and performed in the New York City office where all of Arch's books and records are maintained;
- e. all executive policy and business planning originates in the New York City office;
- f. all advertising and public relations matters emanate from and are handled in New York;
- g. all statutorily required regulatory filings for all 52 jurisdictions in which Arch transacts business and all regulatory compliance matters are handled under the supervision of the General Counsel based in the New York City office;
- h. all tax returns are prepared in New York; and
- i. the New York office is designated as Arch's principal place of business on all filings of any kind made by Arch.

8. While a few segments of Arch's varied and wide-spread insurance business are administered from offices outside of New York City (e.g., the Surety division in

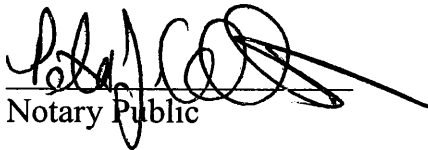
Philadelphia, PA, the Health Care division in St Paul, MN and the Programs Group in Stamford, CT), Arch's headquarters and principal place of business is in New York City from which its officers and directors originate policy and direct, control and coordinate all of Arch's activities regardless of locale.

Conclusion

9. Based on the indisputable facts set forth above and the cases cited in the accompanying memorandum of law, it is clear that Arch has its principal place of business in New York, that there is no diversity jurisdiction under 28 U.S.C. §1332 and that the motion to dismiss the complaint as against Arch should be granted in all respects.


John Richardson

Sworn to before me this
9th day of October, 2007


Notary Public

PETER J. CALLEO, ESQ.
Notary Public, State of New York
No. 02CA6109336
Qualified in New York County
Commission Expires May 3, 2008

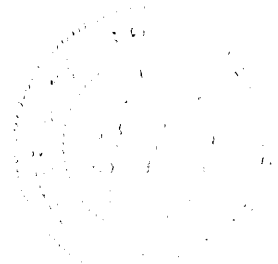


EXHIBIT A



PROPERTY AND CASUALTY COMPANIES - ASSOCIATION EDITION

ANNUAL STATEMENT

FOR THE YEAR ENDED DECEMBER 31, 2006

OF THE CONDITION AND AFFAIRS OF THE

Arch Insurance Company

NAIC Group Code	1279	1279	NAIC Company Code	11150	Employer's ID Number	43-0990710
	(Current)	(Prior)				
Organized under the Laws of	Missouri		State of Domicile or Port of Entry	Missouri		
Country of Domicile	United States of America					
Incorporated	12/15/1971		Commenced Business	12/15/1971		
Statutory Home Office	3100 Broadway (Street and Number)		Kansas City, MO 64111-2479 (City or Town, State and Zip Code)			
Main Administrative Office	New York, NY 10006 (City or Town, State and Zip Code)		One Liberty Plaza, 53rd Floor (Street and Number)			
			212-651-6500 (Area Code) (Telephone Number)			
Mail Address	One Liberty Plaza, 53rd Floor (Street and Number or P.O. Box)		New York, NY 10006 (City or Town, State and Zip Code)			
Primary Location of Books and Records	New York, NY 10006 (City or Town, State and Zip Code)		One Liberty Plaza, 53rd Floor (Street and Number)			
			212-651-6500 (Area Code) (Telephone Number)			
Internet Website Address	www.archinsurance.com					
Statutory Statement Contact	Stephen G. Nolet (Name)		646-563-5598 (Area Code) (Telephone Number)			
	snolet@archinsurance.com (E-mail Address)		646-746-8182 (FAX Number)			
Policyowner Relations Contact	Stamford, CT 06902 (City or Town, State and Zip Code)		300 First Stamford Place (Street and Number)			
			203-388-3300 (Area Code) (Telephone Number)			

OFFICERS

CHAIRMAN & CHIEF EXECUTIVE OFFICER	RALPH EDWARD JONES III	PRESIDENT & CHIEF OPERATING OFFICER	MARK DONALD LYONS #	SENIOR VICE PRESIDENT & CHIEF FINANCIAL OFFICER	FRED SHELDON EICHLER
SENIOR VICE PRESIDENT, SECRETARY & GENERAL COUNSEL	MARTIN JOHN NILSEN	CONTROLLER	RAMIN TARAZ		

OTHER OFFICERS

DENNIS ROBERT BRAND, EVP #	ELLEN HYNES DARRIGRAND, EVP	JOHN STEPHEN EDACK, EVP
THOMAS GRIFFETH KAISER, EVP	ROY GEORGE MAHLSTEDT, EVP #	THOMAS McMAHON, EVP
JOHN PAUL MENTZ, EVP	MICHAEL RAY MURPHY, EVP	STEVEN DOUGLAS NELSON, EVP
JOSEPH CHARLES O'DONNELL, EVP #	WILLIAM ALEXANDER PALMER, EVP	CHARLES BRIAN SCHMALZ, EVP #
PAUL HARMON STEWMAN, EVP #	ELAINE ANNE TRISCHETTA, EVP	MARK GERARD WADE, EVP
NATHAN JAMES WARDE, EVP #		

DIRECTORS OR TRUSTEES

ELLEN HYNES DARRIGRAND	FRED SHELDON EICHLER	THOMAS LAWRENCE GAMBLE
RALPH EDWARD JONES III	THOMAS GRIFFETH KAISER	MARK DONALD LYONS
JOHN PAUL MENTZ	MICHAEL RAY MURPHY	MARTIN JOHN NILSEN

State of NEW YORK SS:
County of NEW YORK

The officers of this reporting entity being duly sworn, each depose and say that they are the described officers of said reporting entity, and that on the reporting period stated above, all of the herein described assets were the absolute property of the said reporting entity, free and clear from any liens or claims thereon, except as herein stated, and that this statement, together with related exhibits, schedules and explanations therein contained, annexed or referred to, is a full and true statement of all the assets and liabilities and of the condition and affairs of the said reporting entity as of the reporting period stated above, and of its income and deductions therefrom for the period ended, and have been completed in accordance with the NAIC Annual Statement Instructions and Accounting Practices and Procedures manual except to the extent that: (1) state law may differ; or, (2) that state rules or regulations require differences in reporting not related to accounting practices and procedures, according to the best of their information, knowledge and belief, respectively. Furthermore, the scope of this attestation by the described officers also includes the related corresponding electronic filing with the NAIC, when required, that is an exact copy (except for formatting differences due to electronic filing) of the enclosed statement. The electronic filing may be requested by various regulators in lieu of or in addition to the enclosed statement.

MARK DONALD LYONS
PRESIDENT & CHIEF OPERATING OFFICER

MARTIN JOHN NILSEN
SENIOR VICE PRESIDENT, SECRETARY &
GENERAL COUNSEL

FRED SHELDON EICHLER
SENIOR VICE PRESIDENT & CHIEF FINANCIAL
OFFICER

Subscribed and sworn to before me this
_____ day of _____

- a. Is this an original filing? Yes [X] No []
b. If no,
1. State the amendment number
2. Date filed
3. Number of pages attached

Index No.: 07 - CV - 06672 - VM 20

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Defendants.

NOTICE OF MOTION AND AFFIDAVIT

TORRE, LENTZ, GAMELL, GARY & RITTMASER, LLP
Attorney(s) for ARCH INSURANCE COMPANY
Office and Post Office Address, Telephone
100 JERICHO QUADRANGLE, SUITE 309
JERICHO, NEW YORK 11753-2702
Tel: (516) 240-8900

To: Esq.

Attorney(s) for

Service of a copy of the within

Dated, N.Y., is hereby admitted:
20

Attorney(s) for